# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON L. SCHWESING,

Defendant-Appellant.

UNPUBLISHED
October 10, 2000

No. 209543
Wayne Circuit Court
LC No. 96-004800

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JASON L. SCHWESING,

Defendant-Appellee.

No. 220876
LC No. 96-004800

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Before: Cavanaugh, P.J., and Saad and Meter, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony-murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to life imprisonment without parole for the felony-murder conviction and to a consecutive two-year term for the felony-firearm conviction. Defendant appealed his convictions as of right in Docket No. 209543. This Court, while retaining jurisdiction, subsequently granted defendant's motion to remand for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), based on defendant's claim that he was denied effective assistance of counsel at trial. Following an evidentiary hearing, the trial court ruled that defendant did not receive

effective assistance of counsel.[1] In Docket No. 220876, the prosecution appeals by leave granted the court's finding of ineffective assistance of counsel. The appeals have been consolidated for our consideration. We affirm the trial court's decision that defendant received ineffective assistance of counsel, reverse defendant's convictions, and remand this case for a new trial.

Evidence adduced at the *Ginther* hearing established that the police arrested defendant without a warrant at his grandmother's house, where he was staying as an overnight guest. Defense counsel did not file a motion to suppress the evidence obtained as a result of defendant's warrantless arrest, believing that defendant did not have standing to challenge the arrest. The evidence obtained as a result of the arrest – primarily a handgun and ammunition and a statement relating to these items – was the key evidence that tied defendant to the murder. There is a reasonable likelihood that without the admission of this evidence, defendant would have prevailed at trial.[2]

Defendant contends that his trial attorney's failure to file a motion to suppress the aforementioned evidence constituted ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of the prevailing professional norms, and (2) that but for the attorney's error or errors, a different outcome would reasonably have resulted. *People v Pickens*, 446 Mich 298, 303, 314, 326-327; 521 NW2d 797 (1994).

We agree with the trial court that defense counsel's misapprehension of the law with regard to standing amounted to a grave legal mistake, one which fell below an objective standard of reasonableness under prevailing professional norms. See *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant's status as a personal, overnight guest at his grandmother's house established defendant's standing to contest the warrantless arrest and warrantless search of his grandmother's house, see *Minnesota v Olsen*, 495 US 91, 98-100; 110 S Ct 1684; 109 L Ed 2d 85 (1990), and certainly the circumstances of the case should have reasonably apprised defense counsel that defendant was indeed an overnight guest in the house. Moreover, defendant had standing to object to the search of the bag in which the gun and ammunition were found, because he owned the bag. See, e.g., *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998).

The trial court also correctly ruled that a motion to suppress the evidence, if made, would reasonably have affected the outcome of trial. The police may not make a nonconsensual entry into a person's home without a warrant in order to make a routine felony arrest. *Payton v New York*, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980); *People v Courts*, 205 Mich App 326, 327; 517 NW2d 785 (1994). Here, it is uncontested that the police did not have a warrant. Although a police

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[1] The trial court did not order a new trial, even though it found ineffective assistance of counsel. The court erroneously believed that it had no authority to order a new trial in light of the fact that this Court retained jurisdiction following the proceedings on remand.

[2] Indeed, while the testimony of two different individuals tied defendant to the murder, the credibility of these individuals was sufficiently suspect such that we cannot deem harmless the presence or absence of the gun and ammunition evidence.

officer suggested at trial and at the preliminary examination that the grandmother consented to the search for defendant,[3] the grandmother testified at the *Ginther* hearing that she did *not* give the police permission to enter or search the house. Her son, who also lived in the house, testified that (1) he, also, did not give the police permission to enter the house, and (2) he revoked any possible consent when the police entered by demanding that they produce a warrant before conducting a search. See *People v Powell*, 199 Mich App 492, 496-498; 502 NW2d 353 (1993). The foregoing facts indicate that if defense counsel had filed a motion to suppress, it may reasonably have been successful and, if so, could reasonably have affected the outcome of the trial. See *Toma, supra* at 303. Indeed, if the police illegally entered the house to effect defendant's warrantless arrest, then the evidence obtained as a result of the arrest, including the gun, ammunition, and defendant's statement regarding the gun and ammunition, would have been excluded. See *People v Spencley*, 197 Mich App 505, 508; 495 NW2d 824 (1992). Since the evidence obtained as a result of the arrest was strong evidence tying defendant to the charged crimes, the suppression of the evidence could reasonably have precluded defendant's convictions.[4] See *Toma, supra* at 303.

We affirm the trial court's finding that defendant received ineffective assistance of counsel, reverse defendant's convictions, and remand this case for a new trial. We do not retain jurisdiction. Given our resolution of this issue, we need not address the remaining issues presented in this consolidated appeal.

/s/ Mark J. Cavanagh
/s/ Henry W. Saad
/s/ Patrick M. Meter

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[3] We note, however, that a consent to search must be unequivocal, specific, and freely and intelligently given. *People v Marsack*, 231 Mich App 364, 378; 586 NW2d 234 (1998). The police officer's testimony here indicated that the grandmother "admit[ted]" and "allow[ed]" the police into the home. The officer's testimony leaves some question regarding whether the grandmother specifically and freely consented to a search of her house for defendant or whether she merely opened the door for the police. See *People v Davis*, 189 Mich App 468, 474; 473 NW2d 748 (1991), reversed on other grounds 442 Mich 1 (1993) (merely opening a door in compliance with a police demand does not constitute valid consent to search a house freely).

[4] See footnote 2, *supra*.